

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34153

SETH HARRIS,	)	2008 Unpublished Opinion No. 531
	)	
Petitioner-Appellant,	)	Filed: July 7, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
STATE OF IDAHO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Deborah A. Bail, District Judge.

Order summarily dismissing application for post-conviction relief, reversed and remanded.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Daniel W. Bower, Deputy Attorney General, Boise, for respondent.

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PERRY, Judge

Seth Harris appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we reverse the order of the district court and remand for further proceedings.

I.

FACTS AND PROCEDURE

Harris pled guilty to aggravated assault, I.C. §§ 18-901(b), 905(a), and burglary, I.C. § 18-1401, based on his having entered the home of his ex-wife's boyfriend and threatening him with a gun. At sentencing, the district court allowed both Harris's ex-wife and her boyfriend (the victim) to make a victim impact statement.

Harris filed a pro se application for post-conviction relief and requested court-appointed counsel. The state filed a response, and the district court provided Harris with a notice of intent to dismiss his application. Harris filed a motion to reconsider the intent to dismiss, but the

district court summarily dismissed Harris's post-conviction application without ruling on his request for appointment of counsel. Harris appeals.

## II.

### STANDARD OF REVIEW

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

If a post-conviction applicant is unable to pay for the expenses of representation, the trial court may appoint counsel to represent the applicant in preparing the application, in the trial court and on appeal. I.C. § 19-4904. The decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court. *Charboneau v. State*, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004). When a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case. *Charboneau*, 140 Idaho at 792, 102 P.3d at 1111; *Fox v. State*, 129 Idaho 881, 885, 934 P.2d 947, 951 (Ct. App. 1997). The district court abuses its discretion where it fails to determine whether an applicant for post-conviction relief is entitled to court-appointed counsel before denying the application on the merits. *See Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

In determining whether to appoint counsel pursuant to Section 19-4904, the district court should determine if the applicant is able to afford counsel and whether the situation is one in which counsel should be appointed to assist the applicant. *Id.* In its analysis, the district court should consider that applications filed by a pro se applicant may be conclusory and incomplete. *See id.*, at 792-93, 102 P.3d at 1111-12. Facts sufficient to state a claim may not be alleged because they do not exist or because the pro se applicant does not know the essential elements of a claim. *Id.* Some claims are so patently frivolous that they could not be developed into viable claims even with the assistance of counsel. *Newman v. State*, 140 Idaho 491, 493, 95 P.3d 642, 644 (Ct. App. 2004). However, if an applicant alleges facts that raise the possibility of a valid claim, the district court should appoint counsel in order to give the applicant an opportunity to work with counsel and properly allege the necessary supporting facts. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112.

### **III. ANALYSIS**

Harris argues that the district court erred when it summarily dismissed his post-conviction application without ruling on his motion for appointment of counsel. The state

counters by arguing that the district court's error was harmless because Harris's application failed to identify facts that could lead to the possibility of a valid claim.

A district court abuses its discretion by dismissing a post-conviction application before addressing a request for appointment of counsel. *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. In *Charboneau*, our Supreme Court concluded that, "at a minimum, the trial court must carefully consider the request for counsel before reaching a decision on the substantive merits of the petition and whether it contains new and admissible evidence." *Id.* at 794, 102 P.3d at 1113. Furthermore, the Court has noted special concerns that arise with pro se post-conviction applications, stating:

[T]he trial court should keep in mind that petitions and affidavits filed by a *pro se* petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the *pro se* petitioner simply does not know what are the essential elements of a claim.

*Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001). Based on the concerns that arise with pro se applicants, the Court concluded that the trial court's notice of intent to dismiss should provide sufficient information regarding the basis for its proposed ruling to enable the applicant to supplement the application with the necessary additional facts, if they exist. This approach ensures that the trial court has an adequate basis for deciding the need for counsel based upon the merits of the claims, rather than a pro se applicant's inexperienced and uneducated assertions. *Id.* The Court concluded:

Although the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition . . . .

*Id.*

In this case, Harris's pro se application contained, among others, the following claim:

c) During the sentencing process, the Court relied heavily on testimony that was hearsay and unsworn to, even though the testimony was given from the witness stand. This testimony went beyond the scope of an impact statement thus requiring cross-examination, however, because the alleged victim wasn't sworn in, cross-examination was unavailable, thereby denying the Petitioner's right to present evidence of mitigation and/or rebuttal.

Harris's application also contained the following ineffective assistance of counsel claim:

c) The Petitioner's attorney of record failed to advise the Petitioner that he could rebut information contained in the pre-sentence investigation report. This report contained evidence of aggravating facts that were not true. Evidence of motive existed, showing why the alleged victim and the Petitioner's ex-wife wanted to show the Petitioner to be a person who was feared by them. Again, the Petitioner possessed evidence that went to the truth of the character of the alleged victim but Petitioner's attorney of record failed to present this evidence.

Harris also filed a motion and affidavit in support of the appointment of counsel. The state filed an answer to Harris's application, and the district court issued Harris a notice of intent to dismiss his application. Although the district court's notice of intent to dismiss provided sufficient information regarding the basis for its proposed ruling, it did not address Harris's request for counsel. In response, Harris filed a pro se motion to reconsider the notice of intent to dismiss. That motion explained:

The court was mislead [sic] by [the victim] and the Prosecutor to believe that [Harris's ex-wife] and the kids were in the home. . . .

The court and the Prosecutor did violate my rights, by allowing the [victim] and [Harris's ex-wife] which is not a victim [sic] in this case, to view my P.S.I. . . . The Prosecutor also allowed statements that were untrue and exaggerated. I have proof that [the victim] was lying to the court and also probably made false statements to the P.S.I. investigator [sic].

Harris's motion to reconsider concluded with "I pray to the court to appoint me an attorney and grant me a hearing to discuss the issues I have brought before the court." Along with Harris's motion to reconsider, he submitted a letter from his mother explaining that his ex-wife "and her children were nowhere present when any of this was supposed to have happened, as was eluded [sic] to in the hearings. [Harris's ex-wife] should in no way be a part of any of these proceeding [sic] or have been allowed to give a victims [sic] statement."

The district court summarily dismissed Harris's application noting that, "while the petitioner did reply, his reply did not raise matters not already considered." The district court's order of dismissal again did not address Harris's request for counsel.

Many of Harris's claims relate to testimony offered at sentencing and information contained in the PSI. Harris alleged that his ex-wife--who was not married to the victim at the time of the incident--was not present when Harris entered the victim's home and threatened him with a weapon, but that the district court mistakenly believed that she was in the home. Specifically, Harris claims it was a violation of due process for the district court to rely on materially-untrue information at sentencing and to make any false assumptions on that

information, that his ex-wife should not have been allowed to view the PSI or make a victim impact statement, and that he received ineffective assistance of counsel because his attorney failed to inform him that he could rebut false and misleading information contained in the PSI.<sup>1</sup>

The record supports Harris's claim that the district court believed Harris's ex-wife was present when Harris entered the victim's home. In addition to statements the district court made at sentencing regarding the "victims," its notice of intent to dismiss provides that "no limitation existed on the contents of [the victim] and [Harris's ex-wife's] victim impact statements at petitioner's sentencing hearing." Accordingly, Harris has pled facts sufficient to raise the possibility of a valid claim.

The state asserts that Harris's claims are without merit and urges this Court to conclude that any error committed by the district court in failing to rule on Harris's request for counsel was harmless. *See Swader v. State*, 143 Idaho 651, 653, 152 P.3d 12, 14 (2007). However, we have concluded that Harris's application alleges facts that raise the possibility of a valid claim. *See State v. Gain*, 140 Idaho 170, 174, 90 P.3d 920, 924 (Ct. App. 2004) (noting that "a defendant is denied due process when the sentencing court relies upon information that is materially untrue or when the court makes materially false assumptions of fact."). *See also* I.C. § 19-5306(5)(a) (defining "victim" as "an individual who suffers direct or threatened physical, financial or emotional harm as the result of the commission of a crime"). Therefore, the district court's failure to rule on Harris's request for post-conviction counsel before dismissing his application cannot be deemed harmless.

#### IV.

#### CONCLUSION

The district court erred in failing to rule on Harris's request for post-conviction counsel before dismissing his application. We cannot conclude that this error was harmless. Therefore, the district court's order summarily dismissing Harris's post-conviction application is reversed and this case is remanded to the district court for further proceedings consistent with this decision. Costs, but not attorney fees, are awarded to appellant on appeal.

Chief Judge GUTIERREZ and Judge LANSING, **CONCUR.**

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<sup>1</sup> Harris also contends that his ex-wife was allowed to contribute statements to the presentence investigation (PSI) report. However, the PSI is not included in the record on appeal.